



Agenda Date: 04/28/04
Agenda Item: 1A

**State of New Jersey
Board of Public Utilities
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IN THE MATTER OF THE ELIGIBILITY)
SPECIFICATIONS FOR PROGRAM MANAGER)
OF THE CLEAN ENERGY PROGRAM AND)
IN THE MATTER OF THE NEW JERSEY CLEAN)
ENERGY PROGRAM)

CLEAN ENERGY

ORDER

DOCKET NOS. EO04030178 &
EO02120955

(SERVICE LIST ATTACHED)

BY THE BOARD:

The New Jersey Board of Public Utilities (Board) authorized, in its September 11, 2003 Order in this matter, the Office of Clean Energy (OCE) to assume the role of Administrator of the Clean Energy Program (CEP). The New Jersey CEP provides customers with incentives to install energy efficiency and renewable energy technologies. Its incentive levels and program budgets are set by the Board on an annual basis and are administered by the OCE. Presently, the OCE is prepared to publish Requests for Proposals (RFP) to perform program management duties for the CEP.

The Electric Discount and Energy Competition Act (EDECA) N.J.S.A. 48:3-49 et. seq., as well as the Board's rules and regulations governing affiliate relations and fair competition codified at N.J.A.C. 14:4-5.1 et. seq., require the Board to determine which services offered by a public utility or its related competitive business segment are competitive.¹ Further, EDECA provides that neither a public utility nor its related competitive business segment may offer a competitive service without first obtaining written approval from the Board. Though several utilities have expressed an interest in performing program management duties for the OCE, Staff and other interested parties have raised concerns regarding the appropriateness of having the utilities manage the energy efficiency and renewable energy programs.

¹ EDECA makes a distinction between the related competitive business segment of a public utility holding company and the related competitive business segment of an electric or gas public utility. See N.J.S.A. 48:3-51. In contrast to electric and gas public utilities and their related competitive business segments, EDECA places no restrictions on the ability of affiliates of public utility holding companies to provide competitive services, except the possibility that they may be ordered by the Board to share revenues pursuant to N.J.S.A. 48:3-55(b) if the competitive services utilize utility assets.

In anticipation of the publication of the RFP to perform program management duties for the CEP, the Board's Secretary issued two letters, dated January 6, 2004 and March 25, 2004, respectively. The letter dated January 6, 2004, directed interested parties to file comments no later than January 20, 2004, with reply comments due no later than January 27, 2004. Those comments were to address the appropriateness, both from a legal and a policy perspective, of permitting the regulated utilities to perform program management services for the Clean Energy Program. Specifically, would allowing regulated utilities to act as program managers satisfy the spirit and intent of EDECA, N.J.S.A. 48:3-49 et seq., as well as the Board's rules and regulations governing affiliate relations and fair competition codified at N.J.A.C. 14:4-5.1 et seq.

Four utilities, including Jersey Central Power & Light (JCP&L), Public Service Electric & Gas (PSE&G), Atlantic City Electric Company (ACE), and Rockland Electric Company (RECO) responded to the solicitation. Each argues that the utilities should be permitted to bid on the RFP for Program Management services. Specifically, PSE&G and ACE argue the utility would be acting as a contractor to a state agency for a heavily regulated program, distinguishing between a competitive *solicitation* (RFP) and a competitive *service* under EDECA. In other words, these two utilities contend that the program management function cannot be a competitive service because the Board is not a retail customer as described in N.J.S.A. 48:3-55(a). In addition, all of the utilities who submitted comments agree that, even if program management is a competitive service, utilities are not prohibited from bidding because each has served as a program manager of a DSM program since the 1980s and hence, they are exempt from the Board's approval requirement under N.J.S.A. 48:3-55(a). Furthermore, the utilities' comments maintain that under the Board's regulations (N.J.A.C. 14:4-5.6) there is no requirement to form a separate affiliate to provide a competitive service previously provided by the utilities.

The Division of Ratepayer Advocate (RPA) expressed concern about the utilities' right to bid on the RFP given the inherent conflict of interest. Specifically, the RPA maintained in its letter of January 27, 2004 that (1) the utilities have an inherent conflict with energy efficiency and renewable programs, (2) utility participation violates the spirit and intent of EDECA, which seeks to encourage market competition among non-utility entities, and (3) cross-subsidization issues will create greater regulatory oversight and resources to be expended.

The Secretary issued a subsequent letter dated March 25, 2004, which detailed the prior Secretary's letter and memorialized the Staff's recommendation that only the non-regulated affiliate of a utility holding company and independent non-utility entities be eligible to bid on the RFPs to perform management duties for the OCE. All interested parties were given notice and opportunity to submit further written comments on the issue of (1) whether program management is competitive, and, if so, (2) whether the Board approves of any utility offering this service. Interested parties were directed to provide further written comments by Wednesday, March 31, 2004. In addition, the letter offered interested parties the option to request an evidentiary hearing or further opportunity to be heard by the Board.

Of the four utilities that provided comments in response to the January 6, 2004 solicitation, only PSE&G replied to the Secretary's March 25, 2004 request for further comment. PSE&G's March 31, 2004 letter, incorporated by reference comments from its prior letter of January 20, 2004, wherein PSE&G argued that nothing within EDECA permits the Board to limit a utility's right to bid on the RFP on an equal basis with other entities. Specifically, PSE&G argued that there is a distinction between competitive services and a competitive solicitation and that, as such, N.J.S.A. 48:3-55(a) which precludes the utilities from offering competitive services to retail

customers without prior written approval from the Board is inapplicable to the case at hand. The March 25, 2004 submission of PSE&G further asserted that the New Jersey Clean Energy Council contemplated utility involvement in program management and that the alleged change in policy direction would make it nearly impossible for an unregulated affiliate of Public Service Enterprise Group to participate in the RFP.

The RPA also responded to the Board's letter of March 25, 2004 by re-iterating its prior comments. The RPA believes "the Board should prohibit the utilities and their affiliates from bidding" on the Program Manager services. If allowed to bid, such utilities should be required to demonstrate that "utility resources developed over the years as a result of rate-payer funded programs for Demand Side Management (DSM), Comprehensive Resource Analysis (CRA) and the CEP (such as databases or other resources) will not provide a competitive advantage to the utility in the bidding process," as well as take steps to describe its procedures for tracking and allocating costs between the CEP and utility services.

In addition, two non-utilities responded to the Secretary's March 25, 2004 letter: Science Applications International Corporation (SAIC) and EAM Associates Inc. (EAM). SAIC contended that Program Management constitutes a competitive service because it is unrelated to the core business of the utility "to operate the electrical distribution system in the most effective and efficient manner." SAIC noted that a number of well-qualified service providers with demonstrated track records exist in New Jersey and elsewhere providing energy efficiency programs. They also note "[t]he perception of an overwhelming advantage on the part of regulated utilities could dissuade many small and medium-sized New Jersey businesses from teaming with non-utility entities in prospective bids" – a concern echoed by the RPA in its comments. Finally, EAM cited its support for non-utility participation, based on successful non-utility participation in energy efficiency matters in other states.

Discussion and Analysis

Though several entities submitted comments in response to the Secretary's letters of January 6 and March 25, 2004, not one entity requested an evidentiary hearing or further opportunity to be heard. Therefore, the Board will decide these issues on the papers.

EDECA authorizes the Board to determine whether or not the Program Manager function constitutes a competitive service:

The board is authorized to determine, after notice and hearing, whether any other service offered by an electric public utility is a competitive service. In making such a determination, the board shall develop standards of competitive service which, at a minimum, shall include: evidence of ease of market entry; presence of other competitors; and the availability of like or substitute services in the relevant market segment and geographic region. Notwithstanding the presence of these factors, the board may determine that any service shall remain regulated for the purposes of public safety and welfare.²

[N.J.S.A. 48:3-56(c)].

² Almost identical language can be found at N.J.S.A. 48:3-58(h) regarding gas public utilities and the related competitive business segments of gas public utilities.

The OCE, in conjunction with the Clean Energy Council, has evaluated other states' system or societal benefit charge energy efficiency and/or renewable energy fund programs. This evaluation was part of the process to develop the "New Jersey Clean Energy Program: Recommendations for Administration and Fund Management – A Report to the Board of Public Utilities from the Clean Energy Council", dated July 21, 2003. The recommendations in this report were adopted by the Board in its September 11, 2003 Order, docket number EO02120955.

The administration and management of the out-of-state programs varies from: full utility administration and management; state agency administration with third party non-utility contractors as program managers; or third party non-utility contractors as administrators and program managers. Specifically, California, Massachusetts, New York, Oregon, Vermont and Wisconsin administer and/or manage their energy efficiency and/or renewable energy programs with third party non-utility contractors. There are no distinguishing factors in this State that would prevent the same and/or like third party non-utility contractors from serving as program managers in New Jersey. For these reasons, the Board **FINDS** there is a relative ease of market entry for this service, there is a presence of other competitors and there is an availability of like or substitute services for management of these program other than utility management.

Furthermore, the Board is not persuaded by the utilities' claims that the program management function is not competitive because the Board is not a retail customer. Neither N.J.S.A. 48:3-56(c) nor N.J.S.A. 48:3-58(h) mentions retail customers in connection with a competitive service finding. And though there is a reference to retail customers in N.J.S.A. 48:3-55(a), the definition of a competitive service in EDECA does not include any allusion to retail customers.³ Moreover, even if EDECA required a retail customer be involved for the service to be regarded as competitive, there is nothing in EDECA that prevents the Board from considering itself a retail customer. The program management function includes the processing of rebates on behalf of consumers of energy efficiency products. As such, the Board, as a matter of convenience, is acting on behalf of all stakeholders, and therefore acting on behalf of retail customers of energy efficiency products. Second, that the Board should be considered a retail customer is supported by a review of the statutory intent to ensure there is no cross-subsidization between a utility and its related competitive business segment. This protection is two-fold.

First, the Board has to ensure that utility funds are not being used to finance the competitive product/service offering in a way that would adversely affect the provision of its non-competitive services to the ratepayers. Pursuant to EDECA, the Board is obligated to protect the ratepayers by ensuring that the finances of the competitive versus non-competitive businesses under the utility umbrella are separate. EDECA specifically requires that the Board make a finding, prior to approving a utility's right to provide a competitive service, that there will be no adverse impact on its provision of safe adequate and proper utility service. Thus, even if the Board is the retail customer, the service may still be classified as competitive, because the opportunity for cross-subsidization, and therefore, an adverse impact on utility service exists.

³ N.J.S.A. 48:3-51 defines "competitive service" as: "any service offered by an electric public utility or a gas public utility that the board determines to be competitive pursuant to section 8 [N.J.S.A. 48:3-56] or section 10 [N.J.S.A. 48:3-58] of this act or that is not regulated by the board."

The second protection afforded by EDECA, concerns the establishment and maintenance of a fair market. EDECA seeks "to ensure that . . . public utilities or their related competitive business segments do not enjoy an unfair competitive advantage over other non-affiliated purveyors of competitive services." N.J.S.A. 48:3-56(f)(1). One example of unfair advantage could result if a competitive business segment of a utility were able to rely on the financing or cross-subsidization of the regulated entity. In this set of circumstances, a non-utility entity's ability to provide the goods or services at a competitive price would be less likely. As noted in the comments by SAIC and the RPA, even the perception that a utility or its related competitive business segment could bid on the RFP might dissuade many small and medium-sized New Jersey businesses from teaming with non-utility entities in prospective bids. Concerns about cross-subsidization and/or lower start-up costs for a utility are clearly implicated by the program management function.

For all of the reasons stated above, the Board FINDS the Program Manager function constitutes a competitive service within the meaning of N.J.S.A. 48:3-56(c).

Given the Board's conclusion that the program management function is a competitive service, as newly structured under the administration of the OCE, the Board must address whether it approves of a utility or its related competitive business segment offering this competitive service. The utilities contend that EDECA and the Board's regulations exempt the utilities from Board approval requirement of N.J.S.A. 48:3-55(a) because they served as program managers of the Demand Side Management (DSM) programs prior to the 1993, the plain language of the statute belies such a finding:

Subject to the approval of the board pursuant to subsection a. of this section, an electric public utility or a related competitive business segment of that electric public utility may provide the following competitive services:

...

An electric public utility that has offered a *competitive service* since prior to January 1, 1993 or a *competitive service* that was approved by the board prior to the effective date of this act is not required to obtain board approval pursuant to subsection a. of this section for that service, but any electric public utility that has not offered a competitive service since prior to January 1, 1993 or has not received previous board approval for such a competitive service shall apply for approval pursuant to subsection a. of this section.

[N.J.S.A. 48:3-55(f)(3)(emphasis added)].⁴

The exception to Board approval only applies to competitive services offered prior to January 1, 1993. The assertion that management of the DSM programs was a competitive service prior to the restructuring of the position by the Clean Energy Program is flawed. Not only is the administrative structure of the energy efficiency and renewable energy programs changing, but the role of the Program Manager will be very different under the administration of the OCE, as well. Prior to the recent restructuring of CEP, the program management service was only offered by the utilities, each utility offered the services to ratepayers in their individual service area, and each utility's program was paid for solely by the ratepayers in its service territory.

⁴ Almost identical language can be found at N.J.S.A. 48:3-58(b) regarding gas public utilities and the related competitive business segments of gas public utilities.

The current proposed structure of the program provides for statewide programs, a competitive solicitation for services, which would include bidding by non-utility entities, and performance-based incentives to deliver the services. Consequently, it is illogical to conclude that the program management services offered by the utilities prior to 1993 were competitive.

Additionally, the utilities' reliance on N.J.A.C. 14:4-5.6(b)(1) and (4) and N.J.S.A. 48:3-55(f)(4) as an exemption from the necessity of Board approval to offer a competitive service is also misplaced. Neither provision provides an exemption to receipt of the Board's written approval. Although N.J.A.C. 14:4-5.6(b)(1) allows utilities to offer competitive services, permission is conditioned on a Board determination pursuant to N.J.S.A. 48:3-56. As discussed above, this provision requires a hearing and notice. Likewise, N.J.A.C. 14:4-5.6(b)(4) cannot provide an exception either, because the regulation requires the substantially similar service offered prior to 1993 to have been competitive (just like the language in EDECA), and as previously stated, the Board does not agree that DSM program management was a competitive service. Even if DSM management could arguably be construed as competitive – it is still not substantially similar to the energy efficiency program management service the OCE envisions going forward.

In order for the Board to grant approval to a gas or electric utility or the related competitive business segment of a gas or electric utility to offer a competitive service:

The Board shall approve a competitive service only upon a finding that:

(1) The provision of a competitive service shall not adversely impact the ability of the [] public utility to offer its non-competitive services to customers in a safe, adequate and proper manner, and in all instances where resources are jointly deployed by the utility to provide competitive services and resource constraints arise, the provision of non-competitive services shall receive a higher priority; and

(2) The price which a [] public utility charges for a competitive service shall not be less than the fully allocated cost of providing such service, as determined by the board, which cost shall include an allocation of the cost of all equipment, vehicles, labor related fringe benefits and overheads, and administration utilized and all other assets utilized and costs incurred, directly or indirectly, in providing such competitive service.

[N.J.S.A. 48:3-55(a) and N.J.S.A. 48:3-58(d).]

Having reviewed all of the comments with respect to the issue of approval, the Board agrees with the comments of the RPA and SAIC, and recognizes that allowing the utilities to bid at this time may create the appearance of an unfair advantage. Other market participants might be discouraged and fail to bid for fear that they will be undercut by utilities that have failed to directly allocate their costs as required by N.J.S.A. 48:3-55(a), including start-up costs. To be sure, EDECA requires audits of the utilities and their related competitive business segments every two years, but that fact will be of no comfort to non-utility bidders if the potential for intermingling of funds can only be uncovered after the bid is awarded. Likewise, the Board agrees with the comments of the RPA and recognizes that by granting utilities or their related competitive business segments approval to bid on competitive service, greater regulatory

resources and oversight will have to be dedicated to the audit process. And while we note that the New Jersey Clean Energy Council contemplated utility involvement in the restructured CEP, the recommendations did not specify the role or the degree of participation the Board or the OCE ought to allow.


Finally, the Board notes that despite the opportunity afforded to all parties to be heard, the utilities who provided comments and requested the ability to provide program management services failed to put forth evidence or even address the issues in N.J.S.A. 48:30-55(a) and N.J.S.A. 48:3-58(d) concerning the allocation of costs and utility resources. The Board cannot make a finding that the utilities have taken measures to ensure the direct allocation of all costs, or to ensure that utility services will receive a higher priority when resource constraints arise, when the utilities have failed to address the issues.

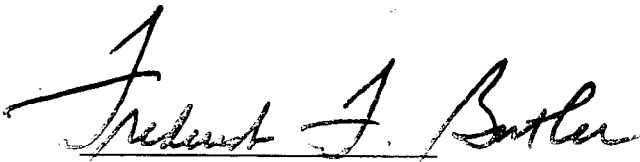
Based on the foregoing, the Board **HEREBY DENIES** the utilities' request to bid on the RFP for program management services. The Board enters this Order without prejudice to the utilities' rights to make another application to provide such services at the end of the contract period under this RFP.

The Board **ORDERS AND DIRECTS** the Office of Clean Energy to circulate the RFPs for various market sectors for the Clean Energy Program.

DATED: April 30, 2004

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BY:


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